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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

Whether the State of Texas may, judicially and/or legislatively, create a cause of action for an employee whose employment is subject to termination at the employer's will when such employee is terminated in order for the employer to avoid, among other things, making future pension plan contributions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Perry McClendon and the Ingersoll-Rand Company. Mr. McClendon has no interest in any corporate entity or partnership.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 USCS § 1140

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 USCS § 1144

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003 (a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

* * * *

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
PARTIES TO THE PROCEEDINGS	II
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	III
TABLE OF CONTENTS	V
TABLE OF AUTHORITIES	VII
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. SINCE RESPONDENT SEEKS LOST FUTURE WAGES, MENTAL ANGUISH AND PUNITIVE DAMAGES AND NOT PENSION BENEFITS, ERISA PREEMPTION DOES NOT APPLY.	6
II. PREEMPTION OF A STATE LAW IS NOT FAVORED ABSENT PERSUASIVE REASONS, AND THE REASONS FOR PREEMPTION ARTICULATED BY THE PETITIONER DO NOT MEET THIS STANDARD.	10
III. ABSENT A SUIT FOR PENSION BENEFITS OR A SUIT REGARDING THE ADMINISTRATION OR REGULATION OF A PENSION PLAN, PREEMPTION DOES NOT APPLY.	11
IV. ERISA PREEMPTION DOES NOT APPLY SINCE INGERSOLL RAND WILL PAY THE DAMAGES AND THE DAMAGES WILL NOT AFFECT THE ADMINISTRATION OF PETITIONER'S PENSION PLAN AND WILL NOT BE PAID OUT OF PLAN FUNDS BY THE PLAN FIDUCIARY.	12
V. THE TEXAS SUPREME COURT'S DECISION IS CONSISTENT WITH THE CONGRESSIONAL INTENT REGARDING ERISA PREEMPTION.	14

Page

VI. FEDERAL DISTRICT COURTS HAVE HELD THAT STATE CAUSES OF ACTION FOR THE LOSS OF FUTURE OR PROSPECTIVE PENSION BENEFITS ARE NOT PREEMPTED BY ERISA. 16

VII. CONCLUSION 18

APPENDIX:

Opinion of the Supreme Court of Texas 1a

Opinion of 14th Court of Appeals of Texas 18a

TABLE OF AUTHORITIES

CASES

Page

Aetna Life Insurance Co. v. Borges, 869 F.2d 142 (2d Cir. 1989) 5, 11

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) 11

Authier v. Ginsberg, 757 F.2d 796 (6th Cir. 1985) 12

Chicago & Northwestern Transportation Co. v. Kalo Rig & Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) 10

Dependahl v. Fallstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981) 11

East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99 (Tex. 1888) 8

Fairmont Creamery Co. v. Ewing, 43 Ohio App. 191, 182 N.E. 883 (1932) 9

Fitzgerald v. Kodex Corp., 882 F.2d 586 (1st Cir. 1989) .. 12

Florida Lime & Avocado Growers, Inc. v. Pall, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 148 (1963) 10

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) 6, 8, 10, 14

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2840, 77 L.Ed.2d 420 (1983) 15

Greenblatt v. Budd Co., 666 F.Supp. 735 (E.D. Pa. 1987) 13

Hovey v. Lutheran Medical Center, 516 F.Supp. 554 (E.D. N.Y. 1981) 7

Malone v. White Motor Corp., 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) 10

Maxfield v. Central States Health, Welfare & Pension Funds, 559 F.Supp. 158 (N.D. Ill. 1982) 12, 13

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 104 S.Ct. 2380, 95 L.Ed.2d 728 (1985) 10

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) 11

Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989) 16, 17

Sabine Pilot Service v. Hauck, 687 S.W.2d 733 (Tex. 1985) 4, 8, 9

Savodnic v. Korvettes, Inc., 488 F.Supp. 822 (E.D. N.Y. 1980) 7

Schlenz v. United Airlines, Inc., 678 F.Supp. 230 (N.D. Cal. 1988) 17

Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985) ... 8, 16

CASES	Page
Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1985)	6, 11
Totton v. New York Life Insurance Co., 685 F.Supp. 27 (D. Conn. 1987)	6, 13
UNITED STATES STATUTES	
29 USCS § 1140	III
29 USCS § 1144(a)	IV
29 USCS § 1144(c)	IV
OTHER AUTHORITIES	
120 Cong. Rec. 29932 (1974)	6, 14

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RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Perry McClendon respectfully submits this brief in opposition to Ingersoll Rand's petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra,* at 1a) is reported at 779 S.W.2d 69 (Tex. 1989). The opinion of the 14th Court of Appeals of Texas (App., *infra,* at 18a) is reported at 757 S.W.2d 816. The opinion of the 133rd Judicial District Court of Harris County, Texas is unreported.

STATEMENT OF THE CASE

This is a wrongful employment termination case which presents no federal question. Respondent makes no claims for pension benefits and there are no issues with respect to the administration or regulation of a pension plan. Shortly after the litigation began, Petitioner, Ingersoll Rand, vested Mr. McClendon's pension. Since that time, Respondent has pursued only his claims for damages arising out of the wrongful termination of his employment.

Respondent induced Mr. McClendon to uproot his family to move to a strange city in order to expand Ingersoll Rand's sales territory. Once Mr. McClendon pioneered a new territory and was about to earn substantial commissions, Ingersoll Rand fired him four months before his ten year pension vesting anniversary. Suit was then filed in the 133rd Judicial District Court of Harris County, Texas, alleging, among other things, a Texas state cause of action for wrongful employment termination and breach of good faith and fair dealing. Shortly after the suit was filed, Ingersoll Rand informed Mr. McClendon that he was fully vested in his pension benefits. Accordingly, the suit before this Court seeks no damages for pension benefits and presents no issues with respect to the administration or regulation of a pension plan. Rather, the suit seeks lost future wages, mental anguish and punitive damages engendered by Petitioner's wrongful termination of Mr. McClendon's employment.

The trial court granted a motion for summary judgment, and that ruling was affirmed by the 14th Court of Appeals. The appellate court held that Mr. McClendon's employment

was an "at will" employment which did not fall within any of the specific exceptions that prohibited employment termination in Texas. The appellate court also refused to apply the doctrine of good faith and fair dealing to the issue of employment termination.

The Supreme Court of Texas granted writ on the issue of whether the doctrine of good faith and fair dealing should apply to the employment setting. The Texas Supreme Court's decision, however, did not reach that issue. Instead, the Court created an additional exception to the Texas employment-at-will doctrine and held that a terminated employee can recover damages in Texas if the principal reason for the employment termination was the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund (Opinion cited in Appendix).

The majority opinion by the Texas Supreme Court (footnote 3), specifically stated that the wrongful termination cause of action was not preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Each state is entitled to develop its own laws with respect to wrongful employment termination, and the Texas Supreme Court has done so in this case.

SUMMARY OF ARGUMENT

Petitioner has conceded that Mr. McClendon has received and will receive all of his pension rights and benefits. This is not a case seeking any pension rights or benefits. Rather, it is a case to determine whether Petitioner's motives and reasons for terminating Mr. McClendon's employment were proper under Texas law. This is not a federal question and has absolutely nothing

to do with the Employment Retirement Income Security Act of 1974 ("ERISA"), or the administration or regulation of a pension plan. The Texas Supreme Court has held that a plaintiff can recover damages for employment termination principally motivated by an attempt to avoid pension obligations. Those damages are completely separate from damages and causes of action sanctioned under ERISA.

Prior to this latest exception to the employment-at-will doctrine, the Texas Supreme Court created an exception whereby a plaintiff could recover damages if he or she was fired for refusing to commit a crime. *Sabine Pilot v. Hauck*, 687 S.W.2d 733 (Tex. 1985). Under *Sabine Pilot*, the fact finder must determine whether the employment termination was motivated by such a refusal. The crime can be a violation of a federal, state or local law; the law itself is not the relevant issue. Rather, the issue is whether the employer's decision to terminate was motivated by the refusal to commit the crime. The *McClendon* exception to the "at will" doctrine is analogous. The specific pension plan, its contents or its administration are not relevant issues. Rather, the issue is whether the employer's decision to terminate was motivated by the employer's attempt to avoid its pension obligations. Consequently, ERISA and Ingersoll Rand's pension plan are irrelevant to this case.

Petitioner's brief does not inform this Honorable Court that there is no issue as to pension benefits in this case or that petitioner has admitted that they owe and will pay those benefits. These crucial facts, however, demonstrate that the Texas Supreme Court was correct in rejecting the preemption argument.

The preemption provision of ERISA was included in that Act to standardize the administration and regulation of pension plans so that employers would not be subject to different rules and regulations when they operated across state lines. The intent of this provision was to forestall the administrative nightmares that would otherwise follow and enable these plans to be managed in a more efficient manner. This Court has stated that permitting a Federal law to preempt a state law is not favored and will not be done unless Congress has unmistakably ordained such a result to occur. The present fact situation is not one to which the ERISA preemption provision was intended to apply.

It has generally been stated that state laws preempted by the ERISA preemption provision are those that (1) provide an alternative cause of action to employees to collect benefits protected by ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits owed to an employee. *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989).

The subject suit seeks damages for breach of employment contract, lost future wages, mental anguish and punitive damages. The case has nothing to do with the collection of benefits protected by ERISA, the interpretation of a pension plan, or the calculation of pension benefits. In addition, any and all recovered damages would be paid by the employer and not the plan or its fiduciary. Accordingly, this cause of action should not be preempted by ERISA.

In addition to the specific reasons for the denial of preemption, the general purpose of ERISA mandates that

this case remain a state cause of action. ERISA was originally conceived to safeguard employees from "such abuses as self-dealing, imprudent investing, and misappropriation of plan funds." *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), quoting 120 Cong. Rec. 29932 (1974). It is clear from the facts that this case has nothing to do with the operation or administration of Petitioner's pension fund. Accordingly, this case has nothing to do with ERISA and preemption is inappropriate.

ARGUMENT

I.

SINCE RESPONDENT SEEKS LOST FUTURE WAGES, MENTAL ANGUISH AND PUNITIVE DAMAGES AND NOT PENSION BENEFITS, ERISA PREEMPTION DOES NOT APPLY.

Respondent is not seeking any pension benefits. Despite Petitioner's attempts to ignore this crucial fact, this fact alone is sufficient to defeat preemption. In *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27, 30 (D. Conn. 1987), the Court stated that preemption is improper if the cause of action has only a tenuous, remote or peripheral effect on a pension plan. *See, also, Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 121, n. 21, 103 S.Ct. 2890, 2901, n. 21, 77 L.Ed.2d 490 (1985). In addition to the Texas Supreme Court, the Eastern District of New York has twice held that an employee may pursue a state law cause of action for the tort of wrongful discharge based on allegations that the employee was terminated solely because the employer sought to deprive the employee of his pension benefits. *Savodnic v. Korvettes, Inc.,* 488 F.Supp. 822 (E.D. N.Y. 1980); *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D. N.Y. 1981).

In the cases cited by the Petitioner, unlike the case before the Court, the plaintiffs sought pension benefits under specific pension plans. Since Mr. McClendon does not seek any pension benefits, this case is easily distinguishable from those cited by the Petitioner. This distinction was also highlighted in the Texas Supreme Court's opinion:

> Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.,* 675 F.Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.,* 644 F.Supp. 806 (E.D. Penn. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledges in his brief to the court of appeals that he is not seeking lost pension benefits but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

779 S.W.2d 69, 71, footnote 3 (Tex. 1989).

Since Respondent seeks no pension benefits in this case, preemption is inapplicable.

In addition, the regulation or administration of Ingersoll Rand's pension plan is totally irrelevant to this case. The only question is whether Ingersoll Rand's principal motivation for termination was to avoid the payment of pension benefits. It is clear that the Court must focus

upon the conduct to which a law is applied and not on the form or label of the law. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). A proper preemption analysis therefore, requires inquiry into whether the conduct challenged by a given state law claim was part of the administration of an employee benefit plan. *Id.* at 1505. As stated, Respondent's cause of action has nothing to do with the regulation or administration of Ingersoll-Rand's employee benefit plan. Rather, the cause of action focuses on Petitioner's motivation for the termination of Respondent's employment. Such a cause of action cannot be and is not preempted by ERISA.

This Honorable Court has previously stated that ERISA's preemption provision does not refer to state laws relating to "employee benefits," but to state laws relating to "employee benefit plans." *Fort Halifax, supra,* at 2215. It is disingenuous, at best, for Petitioner to assert that this case involves Ingersoll Rand's employee benefit plans. Rather, the case creates an exception to the Texas employment-at-will doctrine in an effort to protect Texas employees from unwarranted termination. Texas has long adhered to the employment-at-will doctrine, which allows an employer to terminate an employee for any reason. *East Line & R.R.R. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99 (Tex. 1888). Although the Texas Supreme Court has permitted this doctrine to remain virtually intact for over one century, the Court has recently begun to chip away at the harshness of the doctrine. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), the Texas Supreme Court recognized a cause of action for plaintiffs alleging that employment termination was notivated by the employee's refusal to perform an illegal act. In basing its holding on the same public policy rationale included

in *Hauck,* the Texas Supreme Court in this case held that employment terminations were improper if motivated by an attempt to avoid pension fund payments.

A comparison of these two recent exceptions to the Texas at will doctrine points out the weakness of Petitioner's preemption argument. If an employee is fired for refusing to commit a crime, it is irrelevant if it is a state, federal or local crime. The employer's *motivation* is the relevant issue, and the type of crime is irrelevant. Similarly, if an employee is fired so an employer can avoid making pension contributions, the regulation or administration of the pension plan is irrelevant. Only the employer's *motivation* is relevant, and the substance or administration of the pension plan is unaffected.

Every state in the union has developed a common law governing employment terminations, and the states give employers a vast array of discretion with respect to employment terminations. For example, the employer and employee may contractually agree that an employment relationship may not be terminated without good cause, subject to whatever requisites are present in a state's general common law. *See e.g., Fairmont Creamery Co. v. Ewing,* 43 Ohio App. 191, 182 N.E. 883 (1932). It is axiomatic that each state's laws affect the employment relationship between the employer and employee, including employment terminations. Absent the specific federal statutes governing employment discrimination (which do not apply to this case), the sovereign power of each state enables the state to formulate its own laws. That is what the Texas Supreme Court has done in this case. Its ruling has no effect on ERISA or any pension plan and preemption is not applicable.

II.

PREEMPTION OF A STATE LAW IS NOT FAVORED ABSENT PERSUASIVE REASONS, AND THE REASONS FOR PREEMPTION ARTICULATED BY THE PETITIONER DO NOT MEET THIS STANDARD.

This Court has stated that preemption of a state law by a federal statute is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & Northwestern Transportation Co. v. Kalo Rig & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130 and 67 L.Ed. 2d 258 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 148 (1963). Since Petitioner has argued that the ERISA preemption applies to this case, "the purpose of Congress is the ultimate touchstone" to ascertain whether in fact Congress intended to preempt the type of action taken by the Texas Supreme Court. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 747, 104 S.Ct. 2380, 2393, 95 L.Ed.2d 728 (1985). *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978).

In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987), this Court cited the Congressional Record and ascertained that the ERISA preemption provisions were designed to standardize the administration and regulation of pension plans. Neither the administration nor regulation of a pension plan is involved in this case, and Respondent's cause of action should not be preempted.

III.

ABSENT A SUIT FOR PENSION BENEFITS OR A SUIT REGARDING THE ADMINISTRATION OR REGULATION OF A PENSION PLAN, PREEMPTION DOES NOT APPLY.

Generally, the state laws preempted by ERISA are those that (1) provide an alternative course of action to employees to collect benefits protected by ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits owed to an employee. *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989). All cases cited by Petitioner in favor of preemption, unlike the present case, bear some relationship to the administration or regulation of a pension plan and/or the payment of pension benefits. A brief summary of the cases cited by the Petitioner demonstrates each case's inapplicability to the present case. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (state statute seeking to prevent a procedure known as "integration" was preempted by ERISA because that statute eliminated one method for calculating pension benefits that was otherwise permissible under Federal law); *Shaw v. Delta Airlines, Inc.*, 453 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (state law precluding discrimination in employee benefit programs with respect to pregnant women was preempted by ERISA); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (ERISA preempts any state common law tort or contract claim asserting improper processing of a claim for benefits under an ERISA plan); *Dependahl v. Fallstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981) (state

common law claims resulting from the determination of severance payments and interference with an ERISA-covered whole life insurance plan were preempted by ERISA); *Authier v. Ginsberg,* 757 F.2d 796 (6th Cir. 1985) (ERISA fiduciary could not bring a state law cause of action for wrongful discharge from his position as an ERISA fiduciary under the Act); *Pane v. RCA Corp.,* 868 F.2d 631 (3d Cir. 1989) (ERISA preempted a discharged employee from pursuing a state law breach of contract action to ascertain whether the employee was entitled to be included in an ERISA-covered plan); *Fitzgerald v. Kodex Corp.,* 882 F.2d 586 (1st Cir. 1989) (ERISA preempted a state law action brought by a terminated husband who claimed that his termination was related to the denial of his wife's health benefits under an ERISA plan).

Every one of these cases, unlike the present case, dealt with pension benefits or the administration or regulation of a pension plan. Since the present case does not involve any of those issues, ERISA preemption does not apply.

IV.

ERISA PREEMPTION DOES NOT APPLY SINCE INGERSOLL RAND WILL PAY THE DAMAGES AND THE DAMAGES WILL NOT AFFECT THE ADMINISTRATION OF PETITIONER'S PENSION PLAN AND WILL NOT BE PAID OUT OF PLAN FUNDS BY THE PLAN FIDUCIARY.

ERISA preemption should be applied sparingly, if at all, in cases where the employer itself will have to pay the damages. In *Maxfield v. Central States Health, Welfare*

& Pension Funds, 559 F.Supp. 158 (N.D. Ill. 1982), a terminated employee sought to recover punitive damages resulting from an alleged violation of ERISA. The Court held that ERISA precluded the recovery of punitive damages for the alleged violations, basing its holding upon the fact that the pension fund itself would have to pay these damages. The Court reasoned that such a result would be contrary to the remedial nature of ERISA. *Maxfield* at 160. The Court's language, however, implies that an alternate result may have been reached if the employer and not the pension plan fiduciary would have been liable for any damages awarded.

Other Federal Courts have held that ERISA does not preempt a state law cause of action if the employer and not the pension plan fiduciary, would ultimately be liable for any damages awarded. For example, in *Greenblatt v. Budd Co.,* 666 F.Supp. 735 (E.D. Pa. 1987), a terminated employee claimed that misrepresentations were made about his future pension benefits, and the employee alleged that he relied upon these misrepresentations to his detriment. The employer sought to invoke the ERISA preemption provision. The Court held that the cause of action was not preempted by ERISA and supported its holding by stating that the pension plan fiduciary would not have to pay the damages.

Similarly, in *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27 (D. Conn. 1987), a terminated employee brought a breach of contract suit against the employer and claimed the loss of future pension benefits as one damage element. The Court held that the cause of action was not preempted by ERISA. The *Totton* Court also held that the recovery of such benefits would not affect

the administration of the benefits plan nor would payment be made by the plan fiduciary.

In the present case, Ingersoll Rand will be liable for all damages recovered by Respondent. Mr. McClendon seeks no benefits from the plan; his lawsuit does not affect the administration of the plan's benefits; and no payment would be made by the plan fiduciary. Accordingly, Respondent's causes of action are not preempted by ERISA.

V.

THE TEXAS SUPREME COURT'S DECISION IS CONSISTENT WITH THE CONGRESSIONAL INTENT REGARDING ERISA PREEMPTION.

Petitioner's argument for ERISA preemption rests precariously on the incorrect premise that Ingersoll Rand's pension plan is affected by the case. Once this incorrect premise is exposed, it is clear that the Texas Supreme Court's decision is consistent with the Congressional intent regarding ERISA and its regulatory concerns.

In *Fort Halifax, supra,* this Court included a lengthy discussion upon the regulatory concerns for which ERISA was enacted. Without repeating the discussion contained in that opinion, the key motivating factors for this statutory scheme were that Congress desired to safeguard employees from "such abuses as self-dealing, imprudent investing and misappropriation of plan funds." *Fort Halifax,* 107 S.Ct. at 2219, quoting 120 Cong. Rec. 29932 (1974). These are all factors that protect employees. The Texas Supreme Court's holding is totally consistent with this motivation. The Texas Supreme

Court's *McClendon* exception to the at will doctrine has absolutely no relationship to the types of abuses from which ERISA was designed to protect employees. The holding in no way alters the law with respect to the commingling of funds, self-dealing, or any other abuse that would clearly be for ERISA to govern. Rather, this opinion simply represents one state's decision to change its employment law to include a much needed protection for Texas workers. The opinion has absolutely no effect on the regulation or administration of any pension funds.

In *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2840, 77 L.Ed.2d 420 (1983), this Court addressed whether ERISA generally permits state tax authorities to collect unpaid state income taxes by levying upon funds held in trust for the taxpayers under an ERISA covered vacation benefit plan. This Court held that a state's right to enforce its tax levies is not of central concern to the ERISA statute. That is, even though the California statute would subject certain funds held in an ERISA plan to a state levy, this Court still held that a state's right to enforce its tax levies is not something about which ERISA is concerned. This holding clearly impacts upon an ERISA plan with far more force than does the holding by the Texas Supreme Court in this case. The *Franchise Tax Board* holding enables the state, under the proper circumstances, to remove certain funds from a pension plan that would otherwise be available to plan participants. The Texas Supreme Court's holding, on the other hand, has no effect on pension plans and would require the employer, not the pension fund, to compensate the plaintiff.

VI.

FEDERAL DISTRICT COURTS HAVE HELD THAT STATE CAUSES OF ACTION FOR THE LOSS OF FUTURE OR PROSPECTIVE PENSION BENEFITS ARE NOT PREEMPTED BY ERISA.

In *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), a terminated employee sought to recover, among other things, lost accumulated and prospective pension benefits. Although accumulated benefits were preempted by ERISA, the Court held that the employee's state claim for the loss of prospective benefits was not preempted by ERISA. The Court noted that the claim raised no issue concerning matters pertaining to the regulation and administration of the pension plan and stated that the basic issue involved in this claim is no different from the issue that would be involved in a claim alleging that the employer conspired to force the employee to accept lower wages. *Scott* at 1515. The Ninth Circuit has clearly held, therefore, that claims are not preempted by ERISA unless they involve the regulation or administration of a pension plan. Based on this analysis, preemption does not apply to the case before the Court.

The Fourth Circuit adopted a similar analysis in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989). This case involved a wrongful termination action alleging, among other things, breach of an employment contract. The employment termination impacted upon the pension benefits available to the employee, and the state law cause of action sought to recover lost prospective benefits as damages. The Court held that the state law causes of action relating to loss of prospective pension benefits were not preempted by ERISA. The Court based this holding on

the analysis that the claims would not (1) submit the employer to conflicting employer obligations and variable standards of recovery; (2) determine whether any benefits are paid; (3) affect the administration of benefits under the plan; or (4) be paid by the plan fiduciary with plan funds. *Pizlo* at 120.

In *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D. Cal. 1988), a case similar to the present case, a terminated employee brought a state law cause of action against the employer alleging that the employer terminated the employment because the employee (1) was about to vest in a pension plan; (2) was a higher paid employee because of seniority; and (3) was soon to be recalled to a higher paying position with the company. The basis of plaintiff's suit was that the plaintiff sought to recover damages for the lost opportunity to earn future benefits, including pension plan benefits, as a result of the employer's wrongful conduct. The Court held that the state law wrongful termination cause of action was not preempted by ERISA because it was unrelated to an employee benefit plan and touched, at best, only peripherally on ERISA.

The present case is more remote from an ERISA claim than the above cited cases. In this case, the Respondent seeks absolutely no pension benefits, past or future. Respondent has received his pension benefits. What he did not receive was continued employment; and the evidence shows that he was fired because the Petitioner wanted to avoid its pension obligation. The Texas Supreme Court has correctly held that the cause of action created by Petitioner's egregious conduct is a state cause of action that is not preempted by ERISA.

The Texas Supreme Court correctly held that such employer conduct is against sound public policy. The Court recognized that the employment-at-will doctrine should not be used by an employer as a sword to exploit unfortunate employees and a shield to excuse the avoidance of pension plan obligations. Accordingly, the Supreme Court held that an employment termination engendered by an attempt to avoid pension obligations is actionable in the State of Texas. This holding has absolutely no effect on the regulation or administration of pension plans. Accordingly, Petitioner's requests for preemption and writ should be in all things denied.

VII.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Perry McCLENDON,
Petitioner,

v.

INGERSOLL-RAND COMPANY, d/b/a Ingersoll-Rand Company Construction Equipment Group,
Respondent.

No. C-7973.

Supreme Court of Texas.

Oct. 18, 1989.

Rehearing Denied Nov. 15, 1989.

SPEARS, Justice.

This is a suit for wrongful discharge. Perry McClendon sued his former employer, Ingersoll-Rand Company. McClendon alleged that he was discharged from his employment so that Ingersoll-Rand could escape its obligation to contribute to his pension fund. The trial court rendered summary judgment in favor of Ingersoll-Rand. The court of appeals affirmed. 757 S.W.2d 816 (1988). We reverse the judgment of the court of appeals and remand the cause to the trial court.

In August 1972, McClendon began employment with Ingersoll-Rand as a salesperson and distributor of construction equipment. He was paid on a commission basis in accordance with the terms of a "Compensation Arrangement" that was to remain in effect through December 1982; however, this "compensation arrangement" did not specifically dictate the term of McClendon's employment.

In late 1979, Ingersoll-Rand transferred McClendon from San Antonio to Dallas so that he could develop a potentially lucrative market there. McClendon secured a substantial amount of business in Dallas, and McClendon's supervisor later testified that he was satisfied with McClendon's job performance. Nevertheless, Ingersoll-Rand fired McClendon on November 19, 1982. Ingersoll-Rand justified McClendon's termination by claiming that external economic factors mandated a work force reduction of *one* salesperson.

McClendon's termination from employment occurred after he had accumulated nine years and eight months of service to Ingersoll-Rand. Further, the termination occurred exactly four months prior to the vesting of McClendon's retirement and pension benefits, at which time Ingersoll-Rand would have been required to contribute to McClendon's pension fund.

In filing suit, McClendon alleged that Ingersoll-Rand breached its employment contract with him and breached its duty of good faith and fair dealing in connection with the employment relationship.[1] In addition, McClendon asserted a cause of action for wrongful discharge and alleged that Ingersoll-Rand had terminated him to escape its obligation to contribute to his pension fund[2] and to avoid paying him the commission from a particular sale.

1. Because we have decided this cause on other grounds, we need not reach the issues relating to the tort duty of good faith and fair dealing and we express no view on this matter.

2. Although Ingersoll-Rand ultimately allowed McClendon's pension to vest, McClendon argues that such subsequent vesting does not retroactively reverse any bad faith conduct in which Ingersoll-Rand engaged when it terminated McClendon to avoid pension contributions. McClendon argues that the pension plan issue is relevant in order to explain the motivation behind Ingersoll-Rand's initial termination of McClendon.

At issue is whether McClendon's allegations state a cause of action under Texas law. Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

Although this doctrine has been widely accepted, numerous exceptions and limitations have been placed on its application. For example, federal law prohibits the discharge of an employee because of age, race, religion, sex, color or national origin. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (1982 & Supp. III 1985); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977). Federal law also prohibits a private employer from discharging an employee who exercises his rights under the Fair Labor Standards Act to minimum wage and overtime. 29 U.S.C. § 215 (a)(3) (1977 & Supp. 1982). Similarly, Texas has enacted various statutes that restrict an employer's discretion to terminate the employment relationship. *See, e.g.*, TEX. REV. CIV. STAT. art. 5207a (discharge based on union membership); TEX. CIV. PRAC. & REM. CODE § 122.001 (discharge because of jury service); TEX. REV. CIV. STAT. art. 8307c (discharge for filing a worker's compensation claim); TEX. GOV'T CODE § 431.006 (discharge because of active duty in the state military forces); TEX. REV. CIV. STAT. art. 5221k, § 5.01 (discharge based on race, color, handicap, religion, sex, national origin or age).

In addition to state and federal legislation, courts have developed various common-law restraints on the doctrine

of employment-at-will. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), this court recognized a cause of action for a plaintiff alleging that he was discharged for refusing to perform an illegal act. In creating this exception to the employment-at-will doctrine, we considered the changes in American society and in the employer/employee relationship over the course of the past century, and we held that public policy, as expressed in both state and federal law, required such an exception. *See also Petermann v. International Brotherhood of Teamsters, Local 396,* 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (recognizing public policy exception to employment-at-will doctrine in case of employee alleging that he was wrongfully discharged for refusing to perjure himself before a legislative investigative committee).

Numerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees. *See Kelsay v. Motorola, Inc.,* 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.,* 260 Ind. 249, 297 N.E.2d 425 (1973); *Fortune v. National Cash Register Co.,* 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.,* 114 N.H. 130, 316 A.2d 549 (1974); *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank,* 162 W. Va. 116, 246 S.E.2d 270 (1978). More specifically, the Eastern District of New York has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits. *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D.N.Y. 1981). The court expressly recognized the public policy associated with the preservation of pension plans for both governmental and private employees. *Id.*

at 558; *see also Savodnik v. Korvettes, Inc.,* 488 F.Supp. 822, 826 (E.D.N.Y. 1980) (recognizing strong public policy "favoring the protection of integrity in pension plans" and allowing wrongful discharge cause of action for plaintiff who alleged that employer fired him to avoid paying pension benefits).

In determining whether McClendon has stated a cause of action under Texas law, we recognize that the state has an interest in protecting employees' interests in pension plans. *Cf.* TEX. REV. CIV. STAT., Title 110B (Vernon 1988) (reflecting state's interest in preserving pension plans for public employees). Also, the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to discharge, fine, suspend or discriminate against any employee for the purpose of interfering with that employee's potential rights under a pension plan. 29 U.S.C. § 1140. The very passage of ERISA demonstrates the great significance attached to income security for retirement purposes.

We hold that public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.[3]

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3. Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.,* 675 F.Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.,* 644 F. Supp. 806 (E.D. Penn. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

We reverse the judgment of the court of appeals and remand this cause to the trial court for trial.

COOK, J., files a dissenting opinion in which PHILLIPS, C.J., and HECHT, J., join.

GONZALEZ, J., files a dissenting opinion.

COOK, Justice, dissenting.

I dissent. The central issue in this case, as argued and briefed by the parties, concerns whether the duty or implied covenant of good faith and fair dealing exists in the context of an employment-at-will relationship. The majority opinion not only fails to address this issue, but also creates a state cause of action based on conduct already prohibited by federal statute. Given the adverse impact that the majority opinion will have upon our court systems, I would affirm the judgment of the court of appeals.

I. ERISA

The court reminds us that § 510 of the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to interfere intentionally with impending pension eligibility. 29 U.S.C. § 1140 (1985). According to the court, ERISA demonstrates the great significance attached to income security for retirement.

I agree. ERISA's § 510 is indeed significant, so significant that it confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action.

Section 510 of ERISA expressly states that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." *Id.* The case law has interpreted § 510 to delineate a cause of action that applies in precisely the same situations as the one considered today. *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

Congress provided for the enforcement of § 510 in § 502, which comprises the statute's civil enforcement provisions. 29 U.S.C. at § 1132. Section 502(e)(1) confines litigation of certain claims to federal court. *Id.* at § 1132(a)(3). One of those claims is the § 510 action. *Id.;* 29 U.S.C. at § 1140. Consequently, an ERISA claimant who sues for termination resulting from intent to avoid pension responsibility may sue only in federal court.

The provisions of § 510 do not initially appear to affect the law set out today. It is, after all, possible for state and federal law to address the same problem. Section 514 of ERISA, however, makes it clear that duplication of effort in this area of the law is simply not allowed. 29 U.S.C. § 1144. Under § 514(a) all provisions of the subchapter in which § 510 is contained preempt state laws that "relate to" employee benefit plans. *Id.* at § 1144(a). In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987), the United States Supreme Court decided that § 514 superseded a state common law that related to an employee benefit plan. The powerful effect of § 514(a) was repeatedly emphasized by the Court, which expressed its

unanimous conviction that Congress intended to establish pension plan regulation as an exclusively federal concern. *Id.* at 45-47, 52-56, 107 S.Ct. at 1551-53, 1555-57.

There can be no doubt that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a). *See Sorosky v. Burroughs Corp.,* 826 F.2d 794 (9th Cir. 1987). Furthermore, because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as cause of action. Arguably, this simultaneous affect on forum and claim may deprive the state court of the power to adjudicate. *See International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

Notwithstanding the power of this set of ERISA provisions, a plaintiff might still rely on our decision today to bring our version of the claim for pension-related wrongful discharge in a state court. The plaintiff could purge ERISA from the face of the petition and rely on the well-pleaded complaint rule to deter removal of the case to federal court. *See Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Under that rule, which states that a petition that describes only state claims on its face prevents removal by a defendant to federal court, a defendant would be left with nothing better than the dubious opportunity to convince a state court that the pertinent ERISA provisions deprive he state court of subject matter jurisdiction.

This procedural block to removal, however, no longer deters the ERISA § 502(a) defendant. In *Metropolitan*

Life Ins. Co. v. Taylor, 481 U.S. 58, 67, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987), the United States Supreme Court created an exception to the well-pleaded complaint rule in deciding that these defendants may remove. Furthermore, the fact that a state court has no jurisdiction over the claim to begin with, which once prohibited removal, restrains defendants no longer. 28 U.S.C. § 1441(e) (Supp. 1989). It is clear, therefore, that defendants faced with a petition that states no more than our new cause of action may remove to federal court, raise the defense of preemption, and replace the common law claim.

By creating today's exception to the employment at will doctrine, the court misleads employees by providing them with an imaginary claim. ERISA, on the other hand, provides them with a real and enforceable claim that they may bring in federal court and at the same time supersedes the claim manufactured today. I believe that ERISA's provisions make it doubtful that a state court even has power to adjudicate the new cause of action. In any case, astute defendants need not wait to find out. They need only remove to federal court and raise a defense of preemption. I sincerely regret the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans.

II. SUMMARY JUDGMENT

An equally profound implication of the majority opinion concerns the availability of summary judgment proceedings in wrongful discharge cases. In its motion for summary judgment. the general supervisor for Ingersoll-Rand submitted a sworn affidavit stating that Mc-

Clendon's termination arose as part of a company-wide reduction of the workforce in response to adverse economic conditions. The response by McClendon noted that his termination occurred four months prior to the vesting of his pension, at which time the company would have been required to contribute $3000 to his employee pension fund. McClendon also relied on comments made by his supervisor, who stated his general satisfaction with McClendon's job performance. This evidence, according to the holding of the majority, is sufficient to raise a fact issue on whether the employer terminated the employee in part to escape contributions to the employee pension fund.

This holding, however, raises a question that remains unanswered: when will the evidence presented on motion for summary judgment be insufficient to raise an issue of fact on the employer's intent? The court today finds a fact question under the evidence presented in this case, a case in which the termination preceded the vesting of the benefits by four months; would a fact question also be raised when the termination preceded the vesting by five months or nine years and eleven months? The majority opinion unfortunately fails to provide trial courts and litigants with the answer to this crucial question. In the absence of an answer, an employee is presumably guaranteed a jury trial by merely alleging that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.

This approach undercuts the very purpose of summary judgment proceedings, which are designed to eliminate patently unmeritorious claims and untenable defenses. *See*

In re Estate of Price, 375 S.W.2d 900, 904 (Tex. 1964). The provision for summary judgment proceedings serves the critical functions of eliminating baseless claims from congested trial dockets and saving the unwarranted expenses involved in trying such actions. This concern has likewise been recognized in the context of wrongful discharge actions brought pursuant to ERISA. For example, an employee must establish more than the mere fact that the termination of his employment resulted in a monetary savings to his employer; otherwise, an ERISA violation would occur every time an employer terminated a vested employee. *See Nixon v. Celotex Corp.*, 693 F.Supp. 547, 555 (W.D. Mich. 1988); *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D. Pa. 1986).

Herein lies the crux of my concern with the majority opinion. By permitting tort damages in actions based on the employer's desire to escape an obligation to contribute to pension funds and yet failing to deliniate those circumstances under which a summary judgment would be appropriate, the court has unduly chilled an employer's right to terminate an at-will employee with or without cause. No longer can the vast number of employers rely on a valid reason in terminating employees without a jury's scrutinization of their decisions and the possible imposition of tort damages. By terminating employees at any point prior to their retirement, employers need only wait for the court summons to explain and justify their decisions to a jury. The proverbial "floodgates of litigation" have never been a more appropriate concern than in the decision reached by this court today. For this reason, I strongly oppose the majority's decision to place unwarranted limitations on the employment-at-will doctrine.

III. BREACH OF GOOD FAITH AND FAIR DEALING

In his arguments presented to this court, McClendon seeks to hold Ingersoll-Rand to the duty of good faith and fair dealing in the context of their former employment relationship. Despite his characterization of this duty as an "implied covenant," which suggests an action sounding in contract, McClendon also seeks the recovery of tort damages such as mental anguish, emotional distress, and punitive damages. McClendon based his claim for tort damages on *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987), a case in which this court recognized a duty on the part of insurers to deal fairly and in good faith with their insureds. This duty arises from the special relationship that exists in the insurance context due to an unequal bargaining power between the parties and the special nature of such contracts. *Arnold*, 725 S.W.2d at 167. While implied covenants are contractual in nature, the duty of good faith and fair dealing is imposed by law in insurance relationships. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 n. 1 (Tex. 1987).

Employers, however, do not generally receive economic benefits by terminating productive employees and thus do not require disincentives to terminate employees in addition to those already imposed by law. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 396, 254 Cal. Rptr. 211, 234 (1988); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 973-74 (1984) (hereinafter Epstein, *Contract at Will*). Further, employment relationships do not possess an inequality in bargaining power as a universal characteristic and thus cannot be analogized to insurance relationships on this

basis. *See* Epstein, *Contract at Will*, 51 U. CHI. L. REV. at 973-74; *see also* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 165-67 (1981) (hereinafter Note, *Defining Torts*).

The employment relationship is also distinguishable on the basis of the duties owed by the respective parties under the contract. Employers, unlike insurers, do not owe similar fiduciary duties to their employees, who are themselves agents of the employers and are obligated to act in their employers' interests. *Foley*, 765 P.2d at 395, 254 Cal. Rptr. at 233, (citing Note, *Defining Torts*, 34 STAN. L. REV. at 165-67). The duties owed in an employment-at-will relationship are instead premised on the mutuality of obligations existing between the employee and employer, both of whom are able to terminate the relationship with or without cause. I would therefore decline to extend the duty articulated in *Arnold* and its imposition of tort damages to employment-at-will relationships. There should not be a tort cause of action for a breach of good faith and fair dealing in an employment-at-will relationship. I would thus follow the majority of jurisdictions that have not allowed the recovery of tort damages for a breach of the duty or implied covenant of good faith and fair dealing in at-will employment relationships.

Additionally, McClendon is not entitled to recover contract damages under an implied covenant of good faith and fair dealing in this case. According to McClendon, the company terminated his employment to avoid paying any commissions that he would have earned from future sales. The contractual right to these commissions was set forth in a written compensation agree-

ment, which expressly addressed the commissions to be earned by McClendon in the event that Ingersoll-Rand terminated his employment for any reason. McClendon has not alleged that the company owed any commissions that had already been earned under the terms of this agreement at the time of his termination. Instead, McClendon apparently seeks the recovery of commissions that would have eventually been earned from future sales.

McClendon and Ingersoll-Rand contemplated and expressly set forth the manner by which the commissions would have been earned in the event of a termination. Under the express terms of this agreement, the parties did not create a right on behalf of McClendon to earn potential commissions. Thus, the covenant of good faith and fair dealing cannot be implied in this instance to set aside the express terms of their agreement and permit McClendon's recovery of potential commissions. *See Willis v. Champlain Cable Corp.*, 109 Wash. 2d 747, 759, 748 P.2d 621, 627 (1988).

McClendon further alleges that Ingersoll-Rand terminated his employment in order to prevent the vesting of his retirement and pension benefits, thereby relieving the company of its required contribution to his pension fund. On motion for summary judgment, however, Ingersoll-Rand presented an uncontroverted affidavit stating that McClendon's benefits have in fact vested. Because McClendon has received his retirement and pension benefits, the trial court properly rendered summary judgment with respect to the recovery of these contractual benefits.

I would accordingly affirm the judgment of the court of appeals.

PHILLIPS, C.J., and HECHT, J., join in this dissent.

GONZALEZ, Justice, dissenting.

I join with Justice Cook's conclusions that this cause of action is preempted by ERISA, and that it will be very difficult, if not impossible, to filter out meritless cases by summary judgment as a result of today's opinion. I write, however, to emphasize what the court's decision does not do. It does not extend the duty of good faith and fair dealing to the employment-at-will doctrine; and it does not decide what damages are available for this new cause of action. I further note that the federal authority that the court finds persuasive is questionable.

By point of error, McClendon invited us to engraft the duty of good faith and fair dealing as enunciated in *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) on to the employment-at-will doctrine.[1] We refused.

In responding to this point of error, the court instead created a narrow "exception to the employment-at-will doctrine." In creating this exception, the court fails to give the bench and bar clear guidance as to whether this "exception" creates a new cause of action sounding in tort or whether it merely eliminates the doctrine as a contractual defense. *See Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *see generally*, Annotation, *Discharge of At-Will Employees*, 12 A.L.R. 4th 544 (1982).

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1. We granted McClendon's application for writ of error on points two and four. Point four contended: "The Court of Appeals erred when it failed to recognize that a covenant of good faith and fair dealing should be applied to Respondent's employment relationship with Petitioner."

In an attempt to avoid the preemptive effect of ERISA, the court observes that the plaintiff here is "seeking lost future wages, mental anguish and punitive damages" as a result of the alleged wrongful discharge. P. 71 at n. 3. The court, however, does not resolve whether the plaintiff is entitled to all damages pleaded. This is essentially an open question. In *Azar Nut Co. v. Caille,* 734 S.W.2d 667 (Tex. 1987), we allowed punitive damages, but this was in a statutorily-created cause of action for which the right to exemplary damages could reasonably be inferred from the language of the statute. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), we recognized a common law exception but did not decide the question of available damages. *Id.* at 736 (Kilgarlin, J., concurring). As a general rule, the damages available for common law wrongful termination are contractual in nature. *Greater Fort Worth and Tarrant County Community Action Agency v. Mims,* 627 S.W.2d 149 (Tex. 1982).

Furthermore, the court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D.N.Y. 1981) and *Savodnik v. Korvettes, Inc.,* 488 F.Supp. 822 (E.D.N.Y. 1980) is misplaced. Those two courts created a public policy exception to the employment-at-will doctrine that another New York federal district court refused to follow, stating:

> [A] change in New York's law such as the recognition of a tort which for the past 90 years has not been recognized by the New York Court of Appeals, should not be brought about by a federal district court deciding issues of state law solely by virtue of the diversity of citizenship of the parties before it (citatons omitted). [H]irings for an unspecified or

> indefinite period are freely terminable at the will of either party.

Salanger v. U.S. Air, 560 F.Supp. 202, 205 (N.D.N.Y. 1983). Additionally, one New York intermediate court of appeals considered and refused to follow the same cases the court now finds persuasive:

> We find no case in this state wherein a cause of action for abusive discharge based on a violation of public policy has been sustained and we are unable to subscribe to such a cause of action in light of the well-established principle that an at-will employee may be discharged at any time without cause.

Pavolini v. Bard Air Corp., 88 A.D.2d 714, 715, 451 N.Y.S.2d 288, 289 (1982). The highest court of the State of New York has declined opportunities to carve out exceptions to the employment-at-will doctrine. *See Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 443 N.E. 2d 441, 457 N.Y.S.2d 193 (1982); *Murphy v. American Home Products Corp.,* 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *see also Salanger,* 560 F. Supp. at 205; *Parowich v. Chemical Bank,* 98 A.D.2d 318, 470 N.Y.S.2d 599 (1984).

For the above reasons, I dissent.

Perry McCLENDON,
Appellant,

v.

INGERSOLL-RAND CO.,
Appellee.

No. C14-87-768-CV.

Court of Appeals of Texas,

Houston (14th Dist.).

July 21, 1988.

Rehearing Denied Aug. 18, 1988.

Before JUNELL, SEARS and CANNON, JJ.

OPINION

JUNELL, Justice.

This is a wrongful discharge case. Appellant Perry McClendon sued his former employer, Ingersoll-Rand Co., after he was released from his position as a salesman. He alleged that his employment contract was not terminable at will. He also alleged that appellee had breached an implied covenant of good faith and fair dealing, and that appellee intentionally inflicted emotional distress upon him. The trial court rendered summary judgment against appellant. We affirm.

Appellee had employed appellant for nine years and eight months at the time of the termination. Appellant stated in his petition that retirement benefits would have

vested to his benefit if he had continued in appellee's employ for four more months. Furthermore, he alleged that he had laid the ground work for a large transaction with Trinity Equipment, but that the wrongful discharge deprived him of commissions from that sale. In support of his claims that the employment relationship was not terminable at will, he points to a series of writings which govern the calculation of such commissions.

At the time of the termination (Nov. 19, 1982) appellant and his employer determined commissions by reference to a "Compensation Arrangement." Each year the employer promulgated guidelines in such a document which fixed the sales quota, expense budget, and commission schedules for all sales personnel. The parties disagree over whether the compensation arrangement limited their ability to end the relationship at will. Although it does not address the issue directly, the 1982 version of the "arrangement" provides in part:

> TERMINATIONS
>
> When the employment by I-R of a commissioned Distributor Representative terminates for any reason before the equipment on which he has been recommended for commission has been invoiced, he is to be paid one-half (1/2) commission on the sales credit when the equipment is invoiced. In the determination of commission payable under this paragraph, only firm orders on which the commissioned Distributor Representative is recommended for commission and which are received up to the close of the last full working day of the Distributor Representative's actual employment shall be included, provided such orders are accepted by the Company. Any monthly commission on Rental Equipment ceases at the time of termination. Only equipment invoiced

within ninety (90) days from termination date will qualify for commission.

From the effective date of termination there will be a thirty (30) day period in which the Distributor Representative will be required to furnish I-R with all commissionable sales due him. No commission request beyond this thirty (30) day period will be honored.

The Special Commission Schedule for attaining quotas does not apply if termination occurs prior to the end of the calendar year.

The document ends by noting that it is subject to change by appellee at any time, and that in any event it expires at the end of 1982. Appellant signed the document, as did a representative of appellee.

The first point of error asserts that the written compensation agreement barred application of the "at will" employment doctrine. The at will rule, as usually formulated, allows either party to an employment relationship to dissolve that relationship at any time and for any reason (or no reason at all). This customary statement of the rule constitutes a serious misrepresentation of the law, however, because employers must abide by a host of restrictions on their discretion.

[1-3] Federal legislation prohibits the firing of an employee for reasons of race, color, religion, sex, or national origin. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Federal law likewise bars arbitrary discharge based on age. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623. The Texas Commission on Human Rights Act echoes these restrictions and additionally outlaws discharge based on handicap.

TEX. REV. CIV. STAT. art. 5221k § 5.01. Retaliatory discharge is illegal in a number of circumstances. *See, e.g.*. Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (jury service); National Labor Relations Act, 29 U.S.C. § 158 (union activity); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660 (reporting workplace hazards); TEX. REV. CIV. STAT. art. 8307c (filing a worker's compensation claim); *see generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L. Rev. 667, 669-70 (1984) (listing other statutory limits).

[4] Texas common law similarly curtails an employer's ability to terminate an employee when the sole reason for termination is the employee's refusal to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985).

[5] However, appellant rests his argument not on statutory or common law bases, but on the compensation arrangement. Ingersoll-Rand convinced the trial court that the written document merely stated company policy in the area of sales commissions, and we agree. That the writing calls itself an agreement is in no way a hindrance to dissolution of the employment relation. Indeed, the document's termination paragraphs plainly contemplate that termination may occur at any time. Our conclusion is bolstered by the provision that the "agreement is subject to change, at any time. by the Company without prior written notice."

Appellant relies on *Benoit v .Polysar Gulf Coast, Inc.*, 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd, n.r.e.) for the proposition that an employer's right to terminate an employee is limited when a writing so pro-

vides *"in a meaningful and special way." Id.* at 406 (emphases in original). Rather than engage in a semantic dispute over what the Beaumont Court meant, we regard the quoted phrase simply as a rhetorical flourish on the more pedestrian expression of the rule in the case it cited, *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *Webber* states that employment is at will absent a writing which "specifically" says otherwise. The writing at hand merely regulates sales commissions. Point of error one is overruled.

[6] Point of error two claims that the compensation agreement is ambiguous. Although appellant maintains in his reply brief that he raised this argument below, his response to the motion for summary judgment contains no mention of ambiguity. The only conceivable reference to ambiguity appears in the response at paragraph VI, entitled "Burden of Proof." That paragraph reminds the court that Ingersoll-Rand assumes the burden of proof on all elements of its cause of action, including a showing that the "provision in question is capable of only one meaning or interpretation." The next and final sentence states that "Defendants have not met this burden, and Defendants' Motion for Summary Judgment must be denied."

This passing comment does not meet the requirement that a response *expressly present* the issue to the trial court. TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). On the contrary, this is no more than a challenge to the legal sufficiency of the movant's proof, a challenge which is available on appeal in any event, regardless of whether a response has been filed. Appellant's third point of error

raises just such a challenge. We overrule the second point of error.

[7] The third point of error asserts that fact issues exist concerning interpretation of the compensation agreement. We glean no such fact issues from either of the depositions on file; neither does the instrument itself admit of any interpretation even remotely supportive of appellant's position. The third point of error is overruled.

[8] In his fourth point of error, appellant contends that he substantially performed in regard to the Trinity Equipment deal. This contention does not appear in his response to the motion for summary judgment, although Trinity Equipment is mentioned in paragraph III, entitled "Plaintiff Was Terminated Without Good Cause." (We will address the good cause issue in due course). Appellant's reference to the Trinity Equipment deal can only be read as fortifying his argument that good cause was lacking. Rule 166a(c) does not permit presentation of the substantial performance argument on appeal. We over- the fourth point of error.

[9] Point of error five squarely raises the question whether the parties incorporated a good cause limitation onto Ingersoll-Rand's otherwise unfettered discretion to terminate the relationship. Appellant presented this issue below, despite appellee's claims to the contrary, in paragraph III of his response. Appellant characterizes his employment relationship as containing an "implied in fact" agreement that he not be released except for good cause. This he calls an exception to the at will rule. As evidence of this limitation he points out that he relocated himself and his family to Dallas, implicitly relying on Ingersoll-Rand's willingness to continue his employment.

As to the existence of an implied in fact agreement, both sides' arguments cast more heat than light. The question is not whether such an "exception" in the contract is real or illusory; rather the question is simply, what is the scope of the contract? The contract of employment was never reduced to writing, contained no specification of duration and lacked any limitation on the parties' abilities to go their separate ways. Ingersoll-Rand presented affidavit testimony which corroborates our reading of the compensation agreement. Accordingly, the common law rule applies. *See East Line & R.R. Ry. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99 (1888). The fifth point of error is overruled.

[10] In point of error six appellant asks us to create an implied covenant of good faith and fair dealing. The starting point in our analysis is Supreme Court precedent. As recently as five years ago the Supreme Court expressly rejected an invitation to recognize such a rule. *English v. Fischer,* 660 S.W.2d 521, 522 (Tex. 1983). Appellant regards *English,* however, as incapable of survival without extraordinary means, in view of *Arnold v. National County Mut. Fire Ins. Co.,* 725 S.W.2d 165 (Tex. 1987). In the latter case the Court imposed such a convenant on insurers because of a special relationship between insurers and their insureds. Nevertheless, *Arnold* furnishes us no warrant for renouncing a binding precedent and fashioning a new rule to the contrary.

If we were to recognize the employer-employee relationship as "special," that would be tantamount to putting every commercial contract under the umbrella of *Arnold:* vendor-purchaser, lessor-lessee, lender-borrower. Such an extension would undermine the very foundation of *Arnold*

by denying that an insurance relationship is deserving of any special protection: it would in effect repudiate the Court's rationale to confuse the exceptional with the everyday.

[11] Furthermore, the Supreme Court has gone on record as disapproving encumbrances on free movement in the workplace. *See Bergman v. Norris of Houston,* 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.,* 725 S.W.2d 168 (Tex. 1987), An employee is as free to leave the relationship as an employer in a competitive environment: "it is but a normal effect of a free market economy." *Hill v. Mobile,* at 172. *See also* Tex. Const. art. I, § 26.

Finally, as discussed earlier, there is no want of legislation which restricts an employer's ability to dissolve an employment contract. It would be impertinent for us to arrogate to ourselves the right to pass additional laws under the guise of deciding cases. TEX. CONST. art. II, § 1. As Chief Justice Guittard said in a wrongful discharge case virtually identical to this one, "In our system of constitutional government, the primary agency to declare the policy of the state is the legislature. Although legislative processes may be imperfect, appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government." *Watson v. Zep Mfg. Co.,* 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *accord Molder v. Southwestern Bell Tel. Co.,* 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("the legislature is the appropriate agency for effecting a change in policy regarding the employer-employee relationship."). To say that the at will doctrine—a misnomer to begin with—was judicially

created and can therefore be judicially abolished is to misstate history. The at will doctrine was not generated *ex nihilo* in 1888 against a backdrop of some contrary legal regime. *See* Tex. Civ. Prac. & Rem. Code § 5.001 (adopting the common law of England as the rule of decision when no local source can be found); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 Baylor L. Rev. 667, 667-68 (1984) (tracing the history of the rule back to England). The sixth point of error is overruled.

[12] The final point of error assigns error to the adverse summary judgment on appellant's claim of intentional infliction of emotional distress. The summary judgment proof establishes beyond dispute that the discharge of appellant was neither extreme nor outrageous. (Indeed, appellant incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits. He was in fact never denied those benefits). Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable. The seventh point of error is overruled.

The judgment is affirmed.